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Interpretation 28 (1969); Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 764 (1994). In *Weeks v. United States*, 232 U. S. 383, 392 (1914), we held that the Fourth Amendment did not disturb this rule. See also Taylor, *supra*, at 45; Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L. J. 393, 401 (1995) (“The power to search incident to arrest—a search of the arrested suspect’s person . . .—was well established in the mid-eighteenth century, and nothing in . . . the Fourth Amendment changed that”). And neither in *Weeks* nor in any of the authorities discussing the old common-law rule have I found any suggestion that it was based exclusively or primarily on the need to protect arresting officers or to prevent the destruction of evidence.

On the contrary, when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence. For example, an 1839 case stated that “it is clear, and beyond doubt, that . . . constables . . . are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime.” See *Dillon v. O’Brien*, 16 Cox Crim. Cas. 245, 249–251 (1887) (citing *Regina, v. Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771)). The court noted that the origins of that rule “deriv[e] from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law.” 16 Cox Crim. Cas., at 249–250. See also *Holker v. Hennessey*, 141 Mo. 527, 537–540, 42 S. W. 1090, 1093 (1897).

Two 19th-century treatises that this Court has previously cited in connection with the origin of the search-incident-to-arrest rule, see *Weeks, supra*, at 392, suggest the same rationale. See F. Wharton, Criminal Pleading and Practice §60, p. 45 (8th ed. 1880) (“Those arresting a

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defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged”); J. Bishop, *Criminal Procedure* §§210–212, p. 127 (2d ed. 1872) (if an arresting officer finds “about the prisoner’s person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct”).

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule’s well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial.* But once these items are

* Cf. *Hill v. California*, 401 U. S. 797, 799–802, and n. 1 (1971) (diary); *Marron v. United States*, 275 U. S. 192, 193, 198–199 (1927) (ledger and bills); *Gouled v. United States*, 255 U. S. 298, 309 (1921), overruled on other grounds, *Warden, Md. Penitentiary v. Hayden*, 387 U. S. 294, 300–301 (1967) (papers); see *United States v. Rodriguez*, 995 F. 2d 776, 778 (CA7 1993) (address book); *United States v. Armendariz–Mata*, 949 F. 2d 151, 153 (CA5 1991) (notebook); *United States v. Molinaro*, 877 F. 2d 1341 (CA7 1989) (wallet); *United States v. Richardson*, 764 F. 2d 1514, 1527 (CA11 1985) (wallet and papers); *United States v. Watson*, 669 F. 2d 1374, 1383–1384 (CA11 1982) (documents found in a wallet); *United States v. Castro*, 596 F. 2d 674, 677 (CA5 1979), cert. denied, 444 U. S. 963 (1979) (paper found in a pocket); *United States v. Jeffers*, 520 F. 2d 1256, 1267–1268 (CA7 1975) (three notebooks and meeting minutes); *Bozel v. Hudspeth*, 126 F. 2d 585, 587 (CA10 1942) (papers, circulars, advertising matter, “memoranda containing various names and addresses”); *United States v. Park Avenue Pharmacy*, 56 F. 2d 753, 755 (CA2 1932) (“numerous prescriptions blanks” and a check book). See also 3 W. LaFare, *Search and Seizure* §5.2(c), p. 144 (5th ed. 2012) (“Lower courts, in applying Robinson, have deemed evidentiary searches of an arrested person to be virtually unlimited”); W. Cuddihy, *Fourth Amendment: Origins and Original Meaning* 847–848 (1990) (in the pre-Constitution colonial era, “[a]nyone arrested could expect that not only

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taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

The idea that officer safety and the preservation of evidence are the sole reasons for allowing a warrantless search incident to arrest appears to derive from the Court's reasoning in *Chimel v. California*, 395 U. S. 752 (1969), a case that involved the lawfulness of a search of the scene of an arrest, not the person of an arrestee. As I have explained, *Chimel's* reasoning is questionable, see *Arizona v. Gant*, 556 U. S. 332, 361–363 (2009) (ALITO, J., dissenting), and I think it is a mistake to allow that reasoning to affect cases like these that concern the search of the person of arrestees.

B

Despite my view on the point discussed above, I agree that we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and

his surface clothing but his body, luggage, and saddlebags would be searched").

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the bill lists an incriminating call to a long-distance number. He also has in his a wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

II

This brings me to my second point. While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.

The regulation of electronic surveillance provides an instructive example. After this Court held that electronic surveillance constitutes a search even when no property interest is invaded, see *Katz v. United States*, 389 U. S. 347, 353–359 (1967), Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211. See also 18 U. S. C. §2510 *et seq.* Since that time, electronic surveillance has been governed primarily, not by decisions of this Court, but by the stat-

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ute, which authorizes but imposes detailed restrictions on electronic surveillance. See *ibid.*

Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. See Brief for United States in No. 13–212, pp. 2–3. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.